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v.

ROCHE (M) SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CRIMINAL APPEAL NO: 41S-129-2011]
20 FEBRUARY 2014

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PROVIDENT FUND: *Employer's contribution - Failure to pay - Employee reappointed as human resource consultant upon retirement - Whether appointment constituted contract of service or contract for service - Whether employee entitled to Employees Provident Fund ('EPF') contributions - Whether employer liable for failure to contribute to EPF - Employees Provident Fund Act 1991, s. 43(2)*

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LABOUR LAW: *Provident fund - Contribution - Employer's contribution - Failure to pay - Employee reappointed as human resource consultant upon retirement - Whether appointment constituted contract of service or contract for service - Whether employee entitled to Employees Provident Fund ('EPF') contributions - Whether employer liable for failure to contribute to EPF - Employees Provident Fund Act 1991, s. 43(2)*

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Mohamed Rafique ('PW1') commenced employment with the respondent on 1 November 1990 as a Personnel/Human Resource ('HR') Manager. In 1997, PW1 was promoted to the position of Human Resource Director until he retired in October 2010. He was also made a member of the Management Committee with effect from 1 January 2002 and enjoyed a 19% Employees

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Provident Fund ('EPF') contribution from the respondent. PW1 officially retired from the respondent when he attained the age of 56 years on 4 October 2004. Prior to that, PW1 had been served with the retirement notice dated 5 August 2004 which he acknowledged receipt on 6 August 2004. The respondent *vide*

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letter dated 10 August 2004, informed PW1 that he would be given a retirement bonus equivalent to one month's salary gross payable with his last salary in September 2004. The respondent had also decided to forfeit the remaining monthly payments in respect of PW1's car loan upon his retirement. In the meantime,

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vide letter dated 5 August 2004, the respondent appointed PW1 as its HR Consultant for a fixed term of one year commencing from 1 November 2004 till 31 October 2005 in the position of Human Resources Director for Malaysia. Thereafter, PW1's subsequent contracts were renewed on a yearly basis on the same terms and conditions of the previous contracts. PW1, in his effort to negotiate a better compensation package for 2009, had sent an e-mail to one Michel Villard attaching the points to consider when making decisions pertaining to PW1's current package as a consultant. The main points raised *inter alia* were that because the respondent considered PW1 as a consultant, PW1 was unable to contribute to EPF and if PW1 had contributed to EPF, the respondent would also be bound to contribute. In 2010, PW1's contract was not renewed and as a gesture of goodwill, the respondent paid PW1 a six months sign off bonus. PW1 lodged a complaint with the EPF Department in November 2010 that from December 2004 to January 2008, the respondent had not made any payments to PW1's EPF account. The respondent was then charged at the Magistrate's Court under s. 43(2) of the Employees Provident Fund Act 1991 for failure remit the relevant contributions for PW1 to the EPF. The Magistrate found the respondent guilty and had imposed a fine of RM9,000, in default of a month's imprisonment. The respondent was also ordered to pay a sum of RM316,065. The respondent paid the said fine of RM9,000. Dissatisfied with the decision, the respondent lodged an appeal to the High Court. The issues for determination were (i) whether PW1 was employed by the respondent under a contract of service or a contract for services; and (ii) whether the respondent had failed to remit the relevant contributions for PW1 to the EPF.

Held (allowing appeal; setting aside decision of Magistrate and substituting with an order of acquittal and discharge; fine of RM9,000 ordered to be returned):

(1) After PW1's official retirement at the age of 56, he was no longer an employee of the respondent employed under a contract of service. He was an HR consultant employed under a contract for service and was paid a consultancy fee. (para 22)

(2) Although the respondent did not pay the employer's EPF contribution, the respondent had paid the 19% employer's contribution directly to PW1 by bundling it into his compensation package. For PW1 to claim that the respondent had failed to pay his EPF contributions after having received the 19% employer's contribution in his compensation package was not only grossly dishonest but tantamount to an attempt to obtain double benefits from the respondent. (paras 23 & 24)

(3) The respondent had been inveigled by PW1 to make EPF contributions for him with effect from February 2008. Such payments by the respondent were made in error. The fact that the payments were made despite the fact the PW1 was a consultant and was paid a consultancy fee under a consultancy contract could not conceivably mean that the respondent was required to make EPF contributions for him right from the commencement of his year-to-year consultancy contract from 1 November 2004. (para 26)

(4) The Magistrate erred in finding that the prosecution had succeeded in establishing all the ingredients of an offence under s. 43(2) of the EPF Act without adequately considering whether PW1 was employed under a contract of service or a contract for service after his retirement and subsequent appointment as a HR consultant. Although PW1 was appointed as HR consultant by the respondent, he was not an employee of the respondent employed under a contract of service. PW1 was appointed under a contract for service, namely, the consultancy agreement and that he was paid an annual consultancy fee. Since PW 1 was not an employee of the respondent, no contributions need to be paid by the respondent. Therefore, the second issue was a non-starter and need not be considered. (paras 27, 28 & 29)

Legislation referred to:
Employees Provident Fund Act 1991, s. 43(2)

For the prosecution - Viknesvaran Purnshatman, DPP
For the respondent - Sunitha Ruthram; M/s Sunitha Ruthram & Co

[Appeal from Magistrate Court, Kuala Lumpur; Case No: 8-A87-0773-2011]

Reported by Sandra Gabriel

JUDGMENT

Amelia Tee Abdullah J:

[1] The respondent, Roche (M) Sdn Bhd, was charged at the Magistrate's Court Kuala Lumpur with an offence under s. 43(2) of the Employees Provident Fund Act 1991. The amended charge against the respondent reads as follows:

> PERTUDUHAN (Pindaan)
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> Bahawa kamu Roche (Malaysia) Sdn Bhd yang beralamat di Tkt 14, 58 58th Floor, The Intermark, 189 Jalan Tun Razak, 50400 Kuala Lumpur W. Persekutuan (Kuala Lumpur) di dalam Wilayah Persekutuan sebagai majikan yang berdaftar dengan Lembaga Kumpulan Wang Simpanan Pekerja melalui nombor rujukan 2134420 yang bertanggungan membayar caruman kepada Kumpulan Wang Simpanan Pekerja di bawah Seksyen 43 dan 45 Akta Kumpulan Wang Simpanan Pekerja, 1991 telah tidak menyerahkan wang sebanyak RM7,199 iaitu caruman berkenaan dengan seorang daripada pekerja-pekerja kamu, iaitu MOHAMED RAFIQUE BIN SHER MOHAMED (KP 481004-08-5583) berkenaan dengan upahnya bagi bulan Disember 2004 supaya sampai kepada Kumpulan Wang Simpanan Pekerja tidak lewat dari hari kelima belas bulan yang berikut dengan caruman itu kena dibayar berkenaan dengannya, iaitu pada 15hb Januari 2005 sebagaimana yang dikehendaki oleh Peraturan 3 dalam Peraturan-Peraturan Kumpulan Wang Simpanan Pekerja, 2001 dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 43(2) Akta Kumpulan Wang Simpanan Pekerja, 1991 yang boleh dihukum di bawah Seksyen 43(2) Akta Kumpulan Wang Simpanan Pekerja, 1991.

[2] On 21 September 2012, the learned Magistrate had found the respondent guilty on the amended charge and had imposed a fine of RM9,000, in default to a month's imprisonment. The respondent was also ordered to pay a sum of RM316,065 by way of six instalments with effect from 21 October 2012. The respondent has paid the said fine of RM9,000.

[3] The respondent, being dissatisfied with the decision of the learned Magistrate had lodged an appeal against the said decision. Upon hearing the respondent's appeal, this court had allowed the said appeal. The decision of the learned Magistrate was set aside and substituted with an order of acquittal and discharge. The fine of RM9,000 paid was ordered to be returned.

[4] Being dissatisfied with the above decision, the Public Prosecutor has now filed an appeal to the Court of Appeal against the order of acquittal and discharge.

[5] The appeal in this case revolves around two main issues, namely:

(i) Whether Mohamed Rafique bin Sher Mohamed (PW1) is an employee of the respondent, Roche (M) Sdn Bhd; and

(ii) Whether the respondent had failed to remit the relevant contributions for PW1 to the Employees Provident Fund ("EPF").

I will deal with each of these issues in turn.

Whether Mohamed Rafique Bin Sher Mohamed (PW1) Is An Employee Of Roche (M) Sdn Bhd

[6] In relation to this first issue, it would be necessary to consider whether Mohamed Rafique bin Sher Mohamed (PW1) was employed by the respondent under a contract of service or a contract for services. The evidence adduced will show that PW1 commenced employment with Roche (M) Sdn Bhd, the respondent, on 1 November 1990 as a Personnel/Human Resource Manager with a total annual emolument of RM75,000 (P1).

[7] The staff policy handbook of the respondent was prepared by PW1 (p. 261 of the appeal records, jilid I). The staff handbook provides that the retirement age for all employees shall be on attaining the age of 55 years although Roche would favourably consider employees who have worked well and displayed positive work attitudes for re-employment (p. 262). However, in line with the government's change in the retirement age for public servants, the retirement age in Roche was also changed to 56 years. As such, PW1's retirement age was 56 years.

[8] In 1997, PW1 was promoted to the position of Human Resource Director which position he held until he retired in October 2010. In the course of his employment, he was made a member of the Management Committee with effect from 1 January 2002 for which he enjoyed additional benefits including a 19% EPF contribution from the company (p. 255).

[9] By virtue of his position as Human Resource Director, PW1 was the custodian of the human resource policies and the rules and regulations of the company. He had knowledge of the labour laws of the company as well as the provisions of the Employees Provident Fund Act 1991("EPF Act").

[10] PW1 officially retired from the respondent when he attained the age of 56 years on 4 October 2004. He had earlier been served with the retirement notice dated 5 August 2004 (p. 238) which sought to give him an official notification of his impending retirement date in order to enable him to plan for it in advance. The court notes that PW1 had acknowledged receipt of the said retirement notice on 6 August 2004. *Vide* a letter dated 10 August 2004, PW1 was informed that the respondent would give him "a retirement bonus equivalent to one month's salary gross" payable with his last salary in September 2004. He was also informed that the respondent had graciously decided to forfeit the remaining monthly payments in respect of his car loan upon his retirement (p. 300, jilid 2).

[11] PW1 was desirous of continued employment with the respondent and to that end had submitted a proposal as to the benefits scheme that was applicable (p. 225). *Vide* a letter dated 5 August 2004 (p. 223), the respondent appointed PW1 as its "HR consultant for a fixed term of one (1) year commencing 1 November 2004 to 31 October 2005 in the position of Human Resources Director for Malaysia". The terms of his appointment are reflected in encl. A at p. 224, jilid 1.

[12] What was the position of PW1 in the respondent? He was a consultant and was paid a consultancy fee. This is reflected in the letter dated 1 December 2004 sent to the PW1 (p. 226) after his first month's appointment as a consultant. The said letter confirmed that PW1's "consultancy fee" of RM31,226 for the month of November had been credited directly into his Malayan Banking Berhad account. The court notes that PW1 would have known that he a consultant and not an employee because his name was removed from the list of employees' names in the payroll (See December 2004 payroll at pp. 304-309). It is further noted that for the month of December 2004, it was PW1 who issued and authorised the EPF contributions to EPF and "mengesahkan dan memberi jaminan bahawa butiran dan jumlah caruman bulan Disember 2004 seperti yang terkandung di dalam pita/disket computer yang disertakan adalah sama dengan amaun bayaran

dalam borang ini" (p. 320). As such, PW1 cannot turn around to claim that he was still an employee of the respondent in December 2004.

[13] *Vide* a letter dated 31 October 2005, the respondent offered PW1 another one-year contract as Human Resource Director from 1 November 2005 until 31 October 2006 on the same terms and conditions as his previous one-year contract. Thereafter, PW1's subsequent contracts were renewed on a year-to-year basis on the same terms and conditions of the previous contracts.

[14] PW1, in his effort to negotiate a better compensation package for 2009 had sent an e-mail to Michel Villard attaching "all the points you need to consider when making decisions pertaining to my current package **as a consultant**" (p. 188). (emphasis added). And among the points made by PW1 at p. 189 are *inter alia* that:

(i) for the last three years two months, because the company has considered me as a consultant, I have been unable to contribute to EPF. If I did, the company would also be bound to contribute.

(ii) In the process, I have lost out on savings and the bonus/ dividend payouts by EPF.

(iii) In addition, I am required to pay income tax on my total package in 2004, 2005, 2006 and 2007.

[15] *Vide* a letter dated 25 August 2006, the respondent renewed PW1's consultancy agreement for a period of one year.

[16] The respondent carried out a reorganisation exercise in 2010 and PW1's contract was not renewed. As a gesture of goodwill, the respondent paid PW1 a six-month sign off bonus (see p. 310, jilid 2).

[17] PW1 left the respondent in October 2010. In November 2010, just a month later, he lodged a complaint with the EPF Department to the effect that from December 2004 to January 2008, the respondent had not made any payments to his EPF account.

[18] As such and in line with the afore-stated facts, the primary issue to be determined in this appeal is the status of PW1 during the period from December 2004 to January 2008. Was he an employee of the respondent and therefore required to make EPF contributions?

[19] In summary, learned counsel for the respondent submits that PW1 was not an employee of the respondent during the relevant period, having retired as an employee on 4 October 2004. Thereafter he was appointed as a consultant for a fixed term of a year and paid a consultancy fee. His consultancy contract was renewed from time to time. The respondent had made EPF contributions for PW1 with effect from February 2008 because it was misled by PW1, its HR consultant, into believing that PW1 was entitled to EPH contributions. As a consultant, PW1 was appointed under a contract for service and was earning a fee and was not required to contribute to EPF.

[20] The learned Deputy Public Prosecutor's short response on the issue of whether PW1 is an employee of the respondent can be found at paras. 10 and 11 of his written submissions. In a nutshell, his argument is that although PW1 was offered a contract as a Human Resource Consultant, however the employees of the respondent still recognised PW1 as their Human Resource Director. As such, the appellant contends that PW1 was an employee of the respondent.

Decision Of The Court Re The First Issue

[21] The court is satisfied that the evidence before the learned Magistrate would have clearly showed that the person who lodged the complaint to EPF, PW1, was no longer an employee of the respondent after he had retired on 10 April 2004 upon attaining the age of 56 years. That he had retired from the employment of the respondent and was no longer an employee of the respondent but a consultant who was paid a consultancy fee is borne out by the following evidence:

(i) The retirement notice dated 5 August 2004 served on PW1 which gave him official notice of his impending retirement date which notice was acknowledged received by him on 6 August 2004;

(ii) PW1 was given "a retirement bonus equivalent to one month's salary gross" payable with his last salary in September 2004. Another benefit was that respondent decided to forgo the remaining outstanding monthly payments in respect of his car loan upon his retirement;

(iii) PW1's name was removed from the list of employees' names in the December payroll;

(iv) The letter of appointment as HR Consultant dated 5 August 2004 (p. 223) appointing PW1 for a fixed term of one (1) year in the position of Human Resources Director for Malaysia. The fact that the letter states that "The terms and conditions in the Staff Policy Handbook will not apply to your goodself after your official retirement age" denotes that PW1 would no longer be considered as a "staff" after his official retirement age;

(v) The terms of his appointment at p. 224 of jilid 1 describes his annual compensation of RM374,711 as an "Annual Consultancy Fee";

(vi) The letter dated 1 December 2004 sent to PW1 (p. 226) after his first month's appointment as a consultant to inform him that his "consultancy fee" of RM31,226 for the month of November 2004 had been credited into his bank account; and

(vii) Most importantly, PW1's own e-mail to Michel Villard complaining that for the last three years and two months he had been unable to contribute to EPF because the respondent had considered him as a consultant. This e-mail would reflect that PW1 had acknowledged that he knew that the respondent regarded him as a consultant for whom payment of EPF was not a mandatory requirement.

[22] The court was thus satisfied that the evidence adduced before the Magistrate's Court, primarily in the form of undisputed documentary evidence, would show that after PW1's official retirement at 56, he was no longer an employee of the respondent employed under a contract of service, but that he was an HR consultant employed under a contract for service and paid a consultancy fee.

[23] As has been pointed out by the respondent, PW1 did not suffer any prejudice from this arrangement. Reference to the document at p. 190 jilid 1 will show that the employer's EPF contribution amounting to RM56,772 was bundled into the consultancy package in 2004. The 2004 consultancy package which can be seen at p. 225 of jilid 1 would show that notwithstanding that the respondent did not pay the employer's EPF contribution to EPF because PW1 was not an employee but a consultant employed under a contract for service, nevertheless the respondent had paid the 19% employer's contribution directly to PW1 by bundling it into his compensation package.

[24] The court is of the considered view that for PW1 to claim that the respondent had failed to pay his EPF contributions after having received the 19% employer's contribution in his compensation package is not only grossly dishonest but tantamount to an attempt to obtain double benefits from the respondent.

[25] The court is further of the view that the fact that the respondent made EPF contributions for PW1 following the latter's claim that with effect from February 2008, employees who have retired but are still working would have to contribute to EPF and consequently employers too would have to contribute to EPF, could have no retrospective bearing on the period prior to that date. The court is satisfied that notwithstanding any change to the EPF Act 1991, whether a retired employee who continues to work would have to contribute to EPF or otherwise would nevertheless depend on the nature of his employment and the issue of whether he is employed under a contract of service or a contract for service. In the case of the former situation, the employee will continue to pay EPF. So also will the employer. In the latter situation, he need not do so unless he so desires but the employer is not required under statute to contribute.

[26] The court finds that in the present case, the respondent had been inveigled by PW1 to make EPF contributions for him with effect from February 2008. The court is of the considered view that such payments by the respondent were made in error. The fact that the payments were made despite the fact the PW1 was a consultant and paid a consultancy fee under a consultancy contract CANNOT conceivably mean that the respondent was required to make EPF contributions for him right from the commencement of his year-to-year consultancy contract from 1 November 2004.

[27] Thus, on this first issue, the court finds that the learned Magistrate was clearly in error when she found that the prosecution had succeeded in establishing all the ingredients of an offence under s. 43(2) of the EPF Act without adequately considering or at all whether PW1 was employed under a contract of service or a contract for service after his retirement and subsequent appointment as a HR consultant. The learned Magistrate's grounds of decision was glaringly void of any reasons whatsoever for the conclusion that she arrived at. The said grounds is a classic example of a non-speaking judgment.

[28] For the reasons as afore-stated, the court finds that although PW1 was appointed as HR consultant by the respondent, he was NOT an employee of the respondent employed under a contract of service. The court finds that PW1 was appointed under a contract for service namely the consultancy agreement and that he was paid an annual consultancy fee.

Re The Second Issue Of Whether The Respondent Had Failed To Remit The Relevant Contributions For PW1 To The Employees Provident Fund

[29] In respect of the second issue of whether the respondent had failed to remit EPF contributions for PW1 for the months between December 2004 and January 2008, the court is of the considered view that since PW1 was not an employee of the respondent, no contributions need to be paid by the respondent. The court is of the view that this second issue is a non-starter and need not be considered at all.

Conclusion

[30] In light of the court's finding that PW1 was not an employee of the respondent after his official retirement on 4 October 2004, the court is satisfied that the respondent was not required to make EPF contributions for him after that period. The court is further satisfied that PW1's subsequent appointment as an HR consultant with effect from 1 November 2004 did not make him an employee of the respondent as he was paid an annual consultancy fee with EPF contributions bundled into the compensation package.

[31] For the reasons as afore-stated, the court had allowed the respondent's appeal. The order of conviction of the learned Magistrate was set aside and substituted with an order of acquittal and discharge. The fine of RM9,000 which had been paid was ordered to be returned.